In the High Court of Punjab and Haryana at Chandigarh

C.R. No.3630 of 2006
Date of decision: 07-09-2006

Deepali .....Petitioner

Versus

Pankaj Gupta .....Respondent

CORAM: Hon'ble Mr.Justice Vinod K.Sharma

Present: Mr.Ashok Aggarwal, Senior Advocate with
Ms. Upasana Gupta, Advocate, for the petitioner.
Mr. M.L.Sarin, SeniorAdvocate with
Mr.Vivek Sood , Advocate, for the respondent.

VINOD K.SHARMA,J.

By way of present revision petition the challenge is to the order dated 23-05-2006 passed by the Additional District Judge, Ludhiana, allowing the application moved under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure for amendment of the petition.

The respondent-husband filed a petition for dissolution of marriage on the ground of cruelty. However, during the pendency of the said petition, an application for amendment was made that due to inadvertence and lack of proper legal guidance, the relief of annulment of marriage under Section 12(1) (C) of the Hindu Marriage Act (in short the 'Act') on the ground that his consent for marriage was procured by fraud as to the material facts and circumstances concerning the petitioner-wife, was not prayed for. The case of the respondent-husband was that all the facts were disclosed to the

Advocate and now he has engaged another Advocate, who advised that he could have sought the relief of annulment of marriage on the plea that his consent was obtained by fraud. It was further pleaded in the application that some other incidents had happened during the stay of the petitioner-wife in the matrimonial house which were the acts of cruelty which he intended to incorporate in the present petition.

Thus, by way of amendment, the husband-respondent sought to add words under Section "12 (1) (c)" in the heading of the petition. He further prayed to add paras No. 3-A(i), 3-A(ii), 3-A(iii), 3-A(iv), 3-A(v), 3-A(vi), 3-A(vii) and 3B in the petition. He also wanted to add paras No. 4 (i) (a), 4.1 (b), 4.1(c), 4.1.(d), 4.1(e) and further sought addition of certain lines in para 4 (ii) of the main petition. The respondent also wanted to add para Nos. 4(ii) (a), 4(ii) (b), 4(ii) (c), 4(ii) (d), 4(ii) (e), 6(a) and 6 (b) in the amended petition.

The application was contested by the petitioner-wife on the ground that in the original petition, the plea that his consent was taken by force or fraud was not pleaded and, therefore, the same was not available to the respondent-husband in view of the law laid down by this Court in the case of **Sangita Devi Vs. Roshan Lal, 2004 (4) RCR(Civil) 554.** It was also pleaded that the limitation for filing the petition under Section 12 of the Act on the ground that the consent of the respondent-husband was obtained by force or fraud in relation to any material fact or circumstance concerning the petitioner-wife was one year from the date of marriage in view of the law laid down in the case of **V. Raja Vs. Bhuvaneswari, 1999 (2) RCR (Civil) 175.** It was also claimed that the application was not

properly verified. On merits, the stand of the petitioner-wife was that the original petition was filed on the ground of cruelty and now a contrary stand is being taken that it was due to inadvertence that the relief of annulment of marriage under section 12 (1) (C) of the Act could not be prayed for on account of lack of proper legal advice. It was further claimed that the husband-respondent was well educated and his father was a reputed Chartered Accountant. The case set up by the petitioner-wife was that the said plea of the respondent-husband was an excuse to amend the main petition.

The learned Additional District Judge, Ludhiana, allowed the amendment application on payment of Rs. 1,000/- as costs.

Mr. Ashok Aggarwal, learned senior counsel, appearing for the petitioner, vehemently argued that by way of proposed amendment the respondent-husband was seeking to incorporate a relief under Section 12(1) (C) of the Act claiming the marriage to be void which is not permissible as the provisions of Sections 12 and 13 of the Act deal with two separate situations. According to the learned senior counsel for the petitioner, under Section 12, petition can be filed when valid marriage is not in existence, whereas the petition under Section 13 of the Act can be filed when a person accepts the marriage to be valid. In support of his contention, the learned Senior Counsel placed reliance on the judgment of this Court in **Smt. Neelam Maan Vs. Charanjeet Singh Maan, (2001-1) PLR 252** to contend that this Hon'ble Court did not allow the amendment of a petition from judicial separation to that of divorce on the ground that it would change the cause of action based on new facts. Thus, the contention of the

learned Senior Counsel for the petitioner was that once this Court had held that petition filed for judicial separation cannot be converted into one for divorce on the same principle, an alternative plea in a petition under Section 13 of the Act seeking annulment of marriage under Section 12 of the Act is not permissible.

The next contention of the learned senior counsel for the petitioner was that the reading of the petition originally filed shows that the respondent-husband was aware of the disease of the petitioner at the time when it was filed and, therefore, this cannot be a ground for amendment of the petition specially when plea of fraud was not raised in the original petition.

The next contention raised by the learned senior counsel for the petitioner was that according to the averment in the amendment application, the respondent-husband came to know about the disease on 13-03-2005 whereas the present application for amendment was filed on 7-3-2006 while the original petition was filed on 25-5-2005 i.e. after coming to know about the disease.

Learned Senior Counsel for the petitioner also contended that the averments made in the amendment application itself show that the facts alleged by way of amendment were within the knowledge of the husband-respondent at the time of filing of petition under Section 13 of the Act.

Mr.M.L.Sarin, learned senior counsel appearing for the respondent-husband, contended that the present revision petition is not competent in view of the law laid down by the Hon'ble Supreme Court in **Prem Bakshi & Ors Vs. Dharam Dev & Ors, JT 2002 (1) SC 34** holding

therein as under:-

> "The proviso to sub-section (1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (i) the order made would have finally dispose of the suit or other proceedings or (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under clause (a), the High Court would be justified in interfering with an order of a subordinate Court if the said order finally disposes of the suit or other proceeding.
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> It is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. After all amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Amendment of pleadings, whatever be the nature of such amendment, would not even remotely cause failure of justice or irreparable injury to any party. Appellants only wanted to bring to the notice of the court the subsequent facts and after amendment of the plaint, respondent no.1 would get opportunity to file written statement and he would be able to raise all his defence. Ultimately if the suit is decided against the respondent no.1, he would have a chance to take up these points before the appellate court. It cannot be conceived of a situation that the proposed amendment if allowed would cause irreparable injury or failure of justice."

The next contention of the learned senior counsel for the respondent was that a joint petition under Sections 12 and 13 of the Act can be filed and reliance by the learned senior counsel for the petitioner on the judgment of this Court in **Smt. Neelam Maan's** case (supra) was totally

misconceived as paras 5 and 6 of that judgment give the facts of that case.

> "5. Learned counsel for the wife-petitioner submitted that the respondent (husband) had initially sought judicial separation under Section 10 of the Act on the ground of cruelty. He could not be allowed to convert that petition for judicial separation into one under Section 13 of the Act for divorce through amendment because such amendment if allowed would permit him to introduce a new cause of action and a new relief. Initially, he had claimed judicial separation on the ground of cruelty and through amendment he had sought to claim divorce, which is a greater relief. It was submitted that through amendment, the relief claimed could not be greater than the relief originally claimed. It was submitted that it is true that amendment can be allowed at any stage of the proceedings for the purpose of determining the real question of controversy between the parties but it is equally true that such amendment should not be based on new facts and new cause of action and at the same time amendment should not cause prejudice to the other side. If amendment amounts to merely a different or additional approach to the same facts, the amendment can be allowed even after the expiry of the statutory period of limitation. In support of this contention, he drew my attention to Mettu Naresh Kumar Reddy Vs. Nallore Ramamma, 1997 (2) Civil Court Cases 569 (A.P.) where it was held that "amendment should not be based on new facts and new cause of action." He submitted that in this case, the respondent to his widow asked for judicial separation under Section 10 of the Act in the beginning. During the pendency of the petition, he sought to claim the relief of divorce on the ground of cruelty, which is not permissible.
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> 6. It was submitted that in the garb of amendment, the respondent has sought to bring an altogether new petition in substitution of his original petition inasmuch as in the new

petition are contained the alleged further acts of cruelty resulting from the facts and cause of action occurring after 16.4.97 i.e. after the institution of the original petition. He drew my attention to Sushi Bhusan Banerjee V. Tulsi Charan Basu and others, AIR (37) 1950 Calcutta 107 where it was held that "no amendment can be allowed, which if allowed would introduce an entirely new cause of action."

The learned senior counsel for the respondent further referred to the operative part of the aforesaid judgment which reads as under:-

" I do not think we should go into the merits or otherwise of this allegation of the petitioner. Suffice it to say, the respondent could not have been allowed to incorporate the proposed amendment as the proposed amendment would have the effect of changing the cause of action altogether based on new facts. On the old facts pleaded in the original petition, the Court in its discretion may not feel like granting the relief of divorce, though on the ground of cruelty relief of divorce can be claimed, relief of judicial separation can also be claimed. On the facts originally pleaded, Court may not view that act of cruelty that grave as to dissolve marriage by decree of divorce. To recapitulate after amendment of the Hindu Marriage Act on the ground of cruelty, judicial separation can be claimed, divorce can also be claimed."

Thus, the stand of the learned senior counsel for the respondent was that in the said case it was nowhere held that a petition with an alternative prayer was not maintainable. The said decision was on the particular facts of that case. He also referred to the provisions of Section 13-A of the Act to submit that in case a petition for divorce is filed, the Court can grant relief for judicial separation. The contention of the learned

senior counsel for the respondent was that this judgment was based on principle of Section 13-A of the Act and does not in any way support the contention raised by the learned counsel for the petitioner.

The learned senior counsel for the respondent thereafter submitted that the impugned order was rightly passed by the learned Additional District Judge on the ground that the amendment sought was necessary for determining the real question in controversy. The contention of the learned senior counsel was that in the petition a specific pleading for annulment of marriage was made and, therefore, no new case was set up by the respondent-husband by way of amendment. The argument of the learned senior counsel for the respondent was that this amendment was necessary for just and proper adjudication of the case. For this purpose, he placed reliance on the judgment of the Delhi High Court in **Harish Chander Vs. Bharti Bhardwaj, 1 (2005) DMC 563.** Para 9 of this judgment reads as under:-

> " It is settled law that all amendments of the pleadings should be allowed which are necessary for determination of real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action. Proposed amendment should not cause such prejudice, to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. Hypertechnical approach should not be adopted instead a liberal approach should be the general rule. A prayer for amendment can be rejected if the same is not bona fide."

Learned senior counsel for the respondent also placed reliance

on the judgment of the Hon'ble Supreme Court in the case of **Ragu Thilak D. John Vs. S. Rayappan and others, AIR 2001 SC 699** to contend that the claim of petitioner-wife that no plea of fraud could be raised after one year of marriage cannot be of no avail, firstly for the reason that the present amendment was sought within one year of the knowledge of the disease and secondly, on the ground that the question of limitation cannot be a ground to refuse the amendment.

Learned Senior counsel for the respondent thereafter by placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Sampath Kumar Vs. Ayyakannu and another, (2002) 7 SCC 559** submitted that the learned Court below was right in allowing the amendment as the amendment sought was necessary for determining the real question in controversy between the parties. Para 9 of the said judgment reads as under:-

> "Order 6 Rule 17 CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the

> question of prejudice to the party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."

Learned senior counsel for the respondent also contended by placing reliance on a judgment of the Hon'ble Supreme Court in the case of **Rajesh Kumar Aggarwal Vs. K.K.Modi, AIR 2006 S.C. 1647** that the amendment sought fell in the first part of order 6 Rule 17 CPC which is mandatory in nature. Thus the contention of the learned senior counsel for the respondent was that the amendment sought was necessary for determining real question of controversy between the parties and, therefore, it was the mandatory duty of the Court below to have allowed the amendment. Therefore, no fault can be found with the order passed by the learned Additional District Judge.

Learned senior counsel for the respondent thereafter argued that merits of the proposed amendment cannot be gone into at the stage of allowing the amendment. Therefore, the contention of the learned senior counsel for the petitioner-wife that the amendment could not have been allowed as the facts so alleged were within the knowledge of the respondent-husband at the time of filing the original petition or that the amendment was time barred under the provisions of Section 12 of the Act, cannot be accepted at this stage. The parties have yet to proceed with the trial where all the grounds available to the respective parties to prove their case would be available. Thus the contention of the learned senior counsel for the respondent was that revision petition being without any merit

deserves to be dismissed.

I have considered the respective contentions raised by the learned Counsel for the parties and find no force in the present revision petition.

In my opinion opinion, there can be no bar in filing a joint petition under Sections 12 and 13 of the Act claiming relief in alternative. The Hon'ble Bombay High Court in the case of **Sadhana Satish Kolvankar V. Satish Sachidanand Kolvankar, (2005) 1 Mah. LJ 935** has been pleased to entertain a petition filed under Sections 12(1)(ia) and 13 (1) (ia) of the Act, wherein the prayer was made by the husband seeking divorce on the ground of cruelty as also prayer for decree of nullity on the ground of non-consummation of marriage owing to impotency of wife. The Hon'ble High Court in the said case was pleased to hold as under:-

> " That as far as the grievance of impotence is concerned, doctor clearly opined that although there was difficulty on the part of the appellant in having physical relationship, she has had sexual intercourse, but she was not habituated to it. However, there was no evidence of unchastity against the wife and, therefore, the plea of non-consummation of the marriage was not tenable. The wife had filed criminal complaint against husband, his aged mother and sister-in-law during the pendency of divorce petition which was duly processed and the said complaint had been dismissed the copy of which judgment was duly placed on record in the appeal. It is the impact of cumulative events and circumstances which is needed to be taken into account to consider total impact on the mind of person alleging cruelty. The parties lived together hardly for few months. Their physical relationship was not all smooth. There were constant quarrels. The appellant admitted her guilt, gave in writing but still the

> situation did not improve. The appellant went back to her parents. Thereafter an attempt to reconcile through a social organisation was made. However, that also failed. Having waited for one year thereafter the respondent was constrained to file the proceeding in the Family Court. The appellant on the other hand filed a complaint of cruelty. The respondent cannot be blamed, if he formed an opinion that he was treated with cruelty. The impact of cumulative events and circumstances which is needed to be taken into account to consider total impact on the mind of person alleging cruelty. The case for divorce on the ground of cruelty under S.13(1)(ia) of the said Act was, therefore, made out. Accordingly, the respondent will be entitled to a divorce on that ground. The respondent shall continue to pay by way of maintenance a sum of Rs. 1,200/- per month to the appellant until he arranges to pay a further lump sum amount of Rs. 1.5 lakhs as total maintenance."

The reliance by the learned senior counsel for the petitioner on the judgment of this Court in **Smt. Neelam Maan's** case (supra) is also misconceived as in this case it was nowhere held that a joint petition claiming alternative relief was not permissible.

The contention of the learned senior counsel for the petitioner that as the disease was within the knowledge of the respondent-husband and no plea of fraud was taken in the original petition, the same could not be allowed by way of amendment in view of the law laid down by the Hon'ble Supreme Court in the case of **Municipal Corporation of Grater Bombay V. Lata Pancham and others, AIR 1965 SC 1008 ,** cannot be sustained as in the present case, the respondent was not raising the plea of disease for the first time, but it was so claimed even in the original petition. By way of

present amendment, the respondent-husband has sought to elaborate the said averment and has prayed for a relief available to him under Section 12 of the Act and, therefore, it cannot be said that the said plea in any way has introduced a new case by way of amendment as was contended by the learned senior counsel for the petitioner.

The contention of the learned senior counsel for the petitioner that the amendment cannot be allowed as it was barred under Section 12 of the Act is without any force as at the time of allowing the amendment it was not open to the Court to go into the merits of the case of the respective parties. Even otherwise, the amendment sought prima facie was not barred under Section 12 of the Act since the same was sought within one year of knowledge of the fraud.

In view of what has been stated above, I find force in the contentions raised by the learned senior counsel for the respondent and find no merit in the present revision petition. However, it may be mentioned that the reliance by the learned senior counsel for the respondent that the present revision petition is not maintainable cannot be sustained. The jurisdiction of this Court under Section 227 (3) of the Constitution of India cannot be taken away merely by amendment of the CPC.

For the reasons stated above, the revision petition being without any merit is dismissed with no order as to costs.

September ,2006 **(VINOD K.SHARMA)**
'dls' **JUDGE**